NUMBER: 92-1539

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

SUPREME COURT OF THE
UNITED STATES OF AMERICA
----------X

TERM: OCTOBER, 1992

TERRY HASENSTAB

PETITIONER

-AGAINST-

ROBERT J. McGUIRE AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, NEW YORK CITY POLICE DEPARTMENT AND THE CITY OF NEW YORK

RESPONDENTS
----------X

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

APPENDIX
RULE 14(K)

TERRY HASENSTAB
42 PECONIC DR. NO.
MASSAPEQUA, N.Y.
11758
516 795 3877

APPENDIX

EXHIBIT "A"

NEW YORK STATE COURT OF APPEALS

No. 216 SSM 17
Index No. 2483/84

APPEAL FROM THE APPELLATE DIVISION, NEW YORK STATE SUPREME COURT, COUNTY OF NEW YORK [Hon. Sullivan, J.P., Wallach, Kupferman, Ross and Asch, JJ., Justices of the Supreme Court]

Before
Hon. Wachtler, Simons, Kaye, Titone, Hancock and Bellacosa, Judges of the New York State Court of Appeals.

David Jalosky was on brief for appellant Terry Hasenstab.

Deborah R. Douglas was on brief for the City of New York Police Department.

DECIDED

June 11, 1992.
(Motion for reargument denied September 22, 1992).

The Court, after due deliberation, orders and adjudges that on review of the submissions pursuant to section 500.4 of the Rules, order

affirmed, with costs, for the reasons stated in the memorandum of the Appellate Division. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

EXHIBIT "B"

"APPELLATE DIVISION"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

No. 44071
Index No. 2483/84

APPEAL FROM THE NEW YORK STATE SUPREME COURT, COUNTY OF NEW YORK [Hon. Joseph Mazur, Justice of the Supreme Court]

Before
Hon. Sullivan, J.P., Wallach, Kupferman, Ross and Asch, JJ., Justices of the Supreme Court.

David Jalosky was on brief for appellant Terry Hasenstab.

Deborah R. Douglas was on brief for the City of New York Police Department.

DECIDED

December 12, 1991.

Order, Supreme Court, New York County (Joseph A. Mazur, J.), entered on September 7, 1990, which: dismissed the petition, instituted pursuant to CPLR Article 78, for a judgment, directing the respondents to retro-

actively appoint him to the rank of sergeant in the New York City Police Department, and to recompute petitioner's retirement allowance to reflect the salary of a sergeant rather than of a patrolman, and (2) dismissed petitioner's motion for contempt, is affirmed, without costs.

On October 2, 1964, Mr. Terry Hasenstab (Officer Hasenstab) was appointed to the uniformed force of the New York City Police Department (Department), with the rank of patrolman. Thereafter, on November 24, 1978, Officer Hasenstab took Civil Service Examination #8539 (examination) for promotion to sergeant, and, on July 9, 1980, he was notified that he had failed.

In August 1982, Officer Hasenstab filed an application for accident disability retirement with the Police Pension Fund, Article II (Pension Fund), and, in June 1983, the Medical Board of the Pension Fund

(Medical Board) recommended approval of that application.

Pursuant to a successful CPLR Article 78 challenge, instituted by a group of police officers, not including Officer Hasenstab, and a judgment, entered on July 6, 1983, the written portion of the said examination was rescored for all candidates (emphasis supplied, see, Matter of the Application of Joseph Esposito v. Nadel, Index No. 21835/80). Subsequently, on July 20, 1983, that examination was rerated, and as a result, a new list of those who passed, which included Officer Hasenstab's name, was drafted.

Thereafter, on August 22, 1983, candidates, who had passed the examination, as a result of the rerating, and who were otherwise eligible for promotion, were directed to report to the Police Academy for a Basic Management Orientation Course. Most of them were promoted to sergeant on

September 12, 1983.

While those candidtes for promotion to sergeant were attending the course at the Police Academy, the Board of Trustees of the Pension Fund (Board), on August 23, 1983, approved Officer Hasenstab's application for accident disability retirement. Since Officer Hasenstab waived 105 days of terminal leave, in exchange for a cash payment, his retirement from the Department became effective on August 31, 1983.

Following Officer Hasenstab's retirement, the Department published, on or about September 9, 1983, the revised eligibility list, containing the names, including Officer Hasenstab's, of those persons who had passed the rerated examination, and, on September 15, 1983, Officer Hasenstab was notified in writing that he had passed (emphasis supplied).

Prior to the expiration of the revised

eligibility list, retired Officer Hasenstab (petitioner) instituted, pursuant to CPLR Article 78, a proceeding against the Police Commissioner of the City of New York, the Chairman of the Board of Trustees of the Pension Fund, the Board of Trustees of the Pension Fund, the Department, and the City of New York (respondents) for a judgment, directing the respondents to retroactively appoint him to the rank of sergeant in the Department, and to recompute his retirement allowance to reflect the salary of a sergeant rather than that of a patrolman. The petition alleges, in substance, that " [t]he action of the respondents in failing to notify petitioner that he passed...[the] Exam...prior to his retirement from the..[Department] was arbitrary, capricious and unlawful..." (see, Record on Appeal (RA), at 15). [material in brackets added].

By judgment, entered on or about

October 3, 1984, a Motion Court dismissed the petition, finding that respondent's failure to promote petitioner to the rank of sergeant was not arbitrary and capricious, and did not constitute an abuse of discretion. Subsequently, by order and judgment (one paper), entered on or about January 11, 1988, that Motion Court granted petitioner's second motion to renew, to the extent of: (1) remanding the matter to respondents to consider petitioner's argument that **other police officers had been promoted, while on sick report and suffering from disabling injuries (emphasis supplied)**, and (2) directing the respondents to provide the petitioner with "the medical, promotion and retirement records of Detectives Investigators Pascarella, Pastorella and Senft so that these records may be taken into consideration by the Police Department in their reconsideration of petitioner's

claim" (see, RA, at 269-270). Thereafter, by order, dated February 9, 1989, that Motion Court denied respondents' motion for leave to appeal the order and judgment entered on or about January 11, 1988.

In October 1989, petitioner served respondents with a notice demanding their compliance with the order and judgment. entered January 11, 1988, concerning reconsideration and discovery. By letter, dated November 29, 1989, the Department responded, and stated, inter alia, since the eligibility list, from which petitioner sought promotion to sergeant, had expired on September 19, 1984, the Department was denying that promotion on the basis of the decision of Matter of Deas v. Levitt, 73 NY2d 525 (1989), cert. denied ____US____, 110 S. Ct. 324 (1989)). After receiving that letter, petitioner moved, in February 1990, to hold respondents in contempt, and for $500,000.00 damages for their alleged

failure to take the actions directed by the Motion Court order and judgment, entered January 11, 1988.

Subsequently, by order, entered September 7, 1990, that Motion Court, citing Matter of Deas v. Levitt, supra, dismissed the petition and the petitioner's motion for contempt. Petitioner appeals.

The Court of Appeals, in the Matter of Deas v. Levitt, supra, at 527, held that, "[b]efore being entitled to placement on a special eligible list for a civil service position, an applicant must bring a proceeding, before the list expires, successfully challenging the validity of the list itself...[,] as being contrary to the merit and fitness requirements of the State Constitution (art V, sec 6)..." [material in brackets added]. Applying the legal authority, supra, we agree with the Motion Court that it is controlling, and requires the dismissal of the petition, since it is

undisputed that, before the list expired, the instant petitioner, as mentioned, supra, did not challenge the list's validity, and therefore "he has no right to the relief requested..." (Matter of Deas v. Levitt, supra, at 527-528).

Since we have stated that the successful completion of a civil service examination does not entitle...[a person] to a mandatory right of appointment or any other legally protectable interest. (Matter of Cassidy v. Municipal Civ Serv. Commn., 37 NY2d 526.)..., we find unconvincing petitioner's contention that the respondent acted arbitrarily, capriciously and in bad faith, by failing to notify him that he had passed the rerated examination prior to his accident disability retirement (Matter of Boasi v. New York Civil Service Commission, 158 AD2d 318, 319 (1st Dept. 1990)) [material in brackets added]. In other words, the only right that a person, such as petitioner,

who passes an examination, can assert is "the right to consideration for and a 'hope' of appointment..." (Cassidy v. Municipal Civ Serv, 37 NY2d 526, 529 (1975)). Further, the fact that a statute, such as the New York City Charter, Section 812, subdivision (c) grants an applicant the right to appeal an adverse decision does not "create any property right..." (Matter of Deas v. Levitt, supra, at 532).

After our examination of the Civil Service Law Section 50, subdivision 4, paragraph (b), and Section 52, subdivision 2, as well as the Rules and Regulations of the City of New York (City) Personnel Director, Sections 4.3.2 (d), 4.6.2, and 5.3.8, we find that those provisions enable the respondents to rationally deny civil service appointment or promotion to an applicant, who is medically unfit.

Significantly, more than a month before the examination was rerated, resulting in

petitioner passing, the Medical Board, on June 7, 1983, recommended approval of petitioner's application for accident disability retirement. Accordingly, they deemed him medically unfit to continue to serve as a police officer. Based upon that action of the Medical Board, we find that the respondents did not act arbitrarily and capriciously, when they did not order the petitioner, who was about to be medically retired, to the Police Academy to attend the Basic Management Orientation Course.

We note that the official list of the names of those who passed the rerated examination, and the revised eligible list were not promulgated until September 9, 1983, which was nine days after petitioner's medical retirement became effective on August 31, 1983.

The dissent concedes (see, Dissent, at 6-7) that Matter of Deas v. Levitt, supra,

prohibits the petitioner's retroactive promotion to sergeant, even if the respondents acted arbitrarily and capriciously, since he did not successfully challenge the validity of the list before it expired. Nevertheless, the dissent contends, in substance, that the matter should be remanded for a hearing, since the petitioner may be entitled to damages, if the respondents have acted arbitrarily, capriciously and in bad faith, by not informing him, before his retirement, pursuant to Civil Service Law, Section 50, subdivision 4, that he had not been selected to attend the Basic Management Orientation Course. Based upon our analysis infra, we find that that contention cannot be sustained.

Civil Service Law, Section 50, subdivision 4, entitled: Disqualification of applicants or eligibles, states, in pertinent part, "No person shall be disqual-

ified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification." After examining that provision, we find that it does not apply herein, since the first complete notice of the names of those who passed the rerated examination did not occur until the official list and revised eligible list were promulgated on September 9, 1983, which date was subsequent to the effective date of petitioner's medical retirement from the Department. The dissent offers no legal authority, and we know of none, that requires the respondents to notify applicants of disqualification, prior to the promulgation of an official list of the names of those who passed an examination and the promulgation of a new eligible list.

Further, in their answer to the petit-

ion, the respondents explain that the reason that persons, who passed the re-rated examination, and who were otherwise eligible for promotion, were selected to attend the Basic Management Orientation Course in August 1983, was "so that the promotion process could begin as soon as possible..." (see, RA, at 34-35). While we find respondents' explanation reasonable for the selection of persons to attend that course, we do not find that selection to be the legal equivalent of the promulgation of an official list of those who passed the rerated examination and the revised eligible list. Neither the petitioner nor the dissent offers evidence that any person, who passed the rerated examination was selected to attend that course, once the Medical Board approved of their application for accident disability retirement. Incidentally, no one was promoted

to sergeant from the revised eligible list until September 12, 1983, which was after petitioner's medical retirement.

Although the dissent makes reference to officers **who have been promoted, while suffering from disabling injuries (emphasis supplied)...**" (see, Dissent, at 7), the record indicates these officers were on "sick leave." There is nothing to indicate any person has ever been promoted by the Department, after the Medical Board has recommended approval of the application of such person for accident disability retirement.

In summary, based upon our entire analysis supra, we find that the respondents did not act arbitrarily, capriciously or in bad faith.

We have considered the other contentions of the petitioner, and find

them to be without merit.

Accordingly, we affirm.

All concur except Sullivan and Asch, JJ., who **dissent** in a memorandum by Sullivan, J., as follows:

Petitioner, a retired member of the New York City Police Department, appeals from the dismissal of his Article 78 petition challenging the Department's denial of his application for a retroactive appointment to the rank of sergeant.

Petitioner became a member of the New York City Police Department on October 2, 1964. On November 24, 1978, he took examination #8539 for promotion to the rank of sergeant and was notified, on July 9, 1980, that he had failed.

Petitioner suffered line-of-duty injuries on July 16, 1981 and May 5, 1982, remaining on sick leave as a result of the latter from May 5, 1982 until his retirement from the Police Department in August

1983. In the interim, on August 25, 1982, petitioner filed an application with the Police Pension Fund for accident disability retirement, which was approved by the Medical Board on June 7, 1983 and, ultimately, the Board of Trustees on August 23, 1983. Since petitioner waived 105 days of terminal leave in exchange for a cash payment, his retirement became effective on August 31, 1983.

Meanwhile, on July 6, 1983, one month after the Medical Board found that petitioner had sustained a "permanent and partial disability," and recommended approval of his application for accident disability retirement, the Department, pursuant to court order (see, Matter of Esposito v. Nadel, Supreme Court, N.Y. County, #21835/80, was ordered to rescore examination #8539 to credit alternative responses to four questions. The examination was re-rated and a new list of those who

passed, with 200 additional names, including petitioner's, **promulgated (emphasis supplied)**. Those officers who passed the examination and were otherwise qualified for promotion were notified to begin a basic management orientation course on August 22, 1983, one day before the Board of Trustees' approval of petitioner's retirement application, and were promoted to sergeant on September 12, 1983. Petitioner was not among those so notified. The Department published the revised eligibility list on or about September 9, 1983 and notified petitioner on September 15, 1983 that he passed.

In January 1984, prior to the expiration of the revised eligibility list, petitioner commenced this proceeding, to compel the Department to appoint him to the rank of sergeant, effective August 30, 1983 and, accordingly, to recompute his retirement allowance, on the ground

that the Department's failure to notify him, prior to his retirement, that he had passed the rescored examination was arbitrary and capricious. The Department, citing Civil Service Law Section 61's "one of three persons" discretionary selection provision, argued that even if petitioner had been informed that he passed the rescored examination prior to his medical retirement, he had no vested right to a promotion. Moreover, it noted, Civil Service Law Sections 50 and 52 provide, inter alia,that an eligible candidate, if found physically or mentally unfit for duty, may be denied certification for promotion and that, pursuant to Rules 4.3.2 (d) and 5.3.8 of the City Personnel Director, a determination that a person is unfit for duty "shall" constitute grounds for disqualification for promotion.

The IAS court dismissed the petition, accepting the Department's argument with re-

spect to Civil Service Law Section 61 and finding essentially that the failure to notify petitioner, that he had passed the rescored examination, prior to his retirement, constituted a refusal to promote him due to physical disability. On petitioner's second application to renew, the court granted the application and remanded the matter to the Department to consider petitioner's argument, **as documented by his papers, that other police officers had been promoted from civil service eligibility lists despite being on sick report and suffering from disabling injuries, which precluded performance of full police duties** (**emphasis supplied** by petitioner). The court also directed the Department to provide the petitioner with the medical, promotion and retirement records of other named officers so that those records could be part of any reconsideration of the case. On remand, the Department advised petitioner

that since the list from which he sought promotion had previously expired on September 19, 1984 he could not, pursuant to Deas v. Levitt (73 NY2d 525, cert. denied, ____U.S.____, 110 S. Ct. 324), decided on May 4, 1989, be considered for promotion. Thus, his application for reconsideration was denied.

When petitioner moved to hold the Department in contempt and for $500,000 in damages, for failing to provide him with the various personnel, medical and retirement records, as ordered, the IAS court, citing Deas, dismissed the petition, since petitioner was not challenging the validity of the eligibility list, which had expired but, instead, was alleging only that he had been "wrongly ruled ineligible." This appeal followed. Since I believe that petitioner **has been denied procedural due process (emphasis supplied** by petitioner) for failure to afford him timely notice of his disqualificat-

ion, I would reverse and grant the petition to the extent of remanding the matter to the IAS court for a hearing to determine whether the Department acted arbitrarily in failing to give petitioner notice of his disqualification for promotion to sergeant and whether the Department's decision to deny petitioner such promotion was arbitrary and discriminatory.

In defending its determination, the Department argued that it was within its discretion to refuse to promote a public officer who is physically unable fully to perform police duties, a position with which no one would disagree. On appeal, the Department argues that it "was prohibited from promoting petitioner to sergeant because he was physically and permanently disabled as the result of two previous line-of-duty injuries, and was pending medical retirement." If, indeed, this was the

case, the Department failed to follow statutory procedures by neglecting to give petitioner written notice of his disqualification on these grounds. Civil Service Law Section 50 (4) provides that "[n]o person shall be disqualified [as an eligible] pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification."

As is obvious from this record, although the decision as to who to promote was apparently made after petitioner's application for disability retirement was approved by the Medical Board, it was made before his application had been approved by the Board of Trustees and well before petitioner's August 31, 1983 retirement became effective, since those who were being promoted from the rescored examination re-

ported for an indoctrination course on August 22, 1983. The September 9, 1983 publication of the revised eligibility list and September 15, 1983 notice to petitioner that he had passed the rescored examination, both of which occurred after his retirement, could not constitute compliance with the Department's obligations under Civil Service Law Section 50 (4) since he was never told that he was disqualified from promotion or given the reasons therefor. Thus, petitioner was deprived of the opportunity to make effective use of **his statutory right to an administrative appeal within the adjudicatory procedure established by Section 812 (c) of the New York City Charter (emphasis supplied** by petitioner).

The Medical Board's approval of petitioner's application prior to the determination as to which officers to promote from the rescored examination does not vitiate the Department's notice obligations

under Civil Service Law Section 50 (4). Civil Service Law Section 50 (10) provides that "a medical officer employed or selected by the [Department]" shall make the determination of disability, which, as noted, requires notice to the eligible before it can serve as the basis for disqualification. There is nothing to suggest that the Medical Board's determination carries more weight than that of such an officer, so as to eliminate the requirement of giving the eligible notice and an opportunity to oppose disqualification on disability grounds.

Although the revised eligible list was not promulgated and petitioner was not notified that he had passed the rescored examination until after the effective date of petitioner's retirement, petitioner's disqualification took place, in effect, well before these dates, when he was omitted from the group which was notified to report for the indoctrination course on August 22, 1983

(**emphasis supplied** by petitioner). That action on the part of the Department constituted a **de facto** promulgation of the revised eligible list and, as such, **violated the notice requirement of Civil Service Law Section 50 (4)** (**emphasis supplied** by petitioner). In concluding that there is no legal authority which requires notification to an applicant that he or she had been disqualified prior to the promulgation of a new eligible list and a list of those who passed the rescored examination, the majority essentially takes the position that the Department need not notify an applicant of disqualification until after disqualification has taken place. **Civil Service Law Section 50 (4) clearly provides otherwise** (**emphasis supplied** by petitioner).

While the Commissioner's discretion to determine the fitness of candidates for appointment to the various ranks within the Department is understandably broad, it is not

unlimited, and the reasons for a candidate's disqualification must be sufficiently stated (Civil Service Law Section 50 [4]) so that there can be appropriate review. By failing to give petitioner timely notice that he passed, or any notice that he was being disqualified from promotion for disability reasons, the Department precluded such review. The Department urges that it was prohibited from promoting petitioner since he had sustained two disabling line-of-duty injuries and, based on those injuries, had a pending retirement application, **which it should be noted, the Police Surgeon directed him to file** (**emphasis supplied** by petitioner). This cannot, without more, be relied upon **in view of the Department's promotion to a position subject to a competitive examination of at least one other person who, at the time of his promotion, was physically disabled** (**emphasis supplied** by petitioner). Thus, the Department's failure under Civil

Service Law Section 50 (4) to give petitioner prompt notification of his disqualification and the reasons therefor deprived him of the opportunity to defer action on his retirement application and challenge his disqualification on medical grounds if that, indeed, was the reason he was being denied promotion.

Petitioner, of course, whatever the outcome of this proceeding, can no longer be promoted to the rank of sergeant, even though he commenced this action before the eligibility list expired since he never challenged the validity of the list itself, only his absence from it after having passed the civil service examination. (See, Matter of Deas v Levitt, supra, 73 NY2d 525). He is not, however,seeking promotion to the position of sergeant; his argument has always been that his retirement pension should be recalculated as though he had been promoted to sergeant prior to his

retirement. In that regard, even though, in accordance with Deas, petitioner cannot be promoted retroactively to sergeant even on a finding that the Department's treatment of him was arbitrary and capricious, he would nonetheless, in such circumstances be entitled to a damage award commensurate with his lost benefits.

Finally, it should be noted, petitioner, in support of his claim that the determination to deny him promotion was arbitrary and capricious, points out that the Department did not, in this instance, exercise its "one out of three" discretion in accordance with Civil Service Law Section 61, and that every candidate who passed examination #8539 was promoted. **The Department does not claim otherwise** (**emphasis supplied** by petitioner). **In addition, petitioner argues that other officers, also suffering from disabling injuries, albeit not with pending disability applications which had been recommended for**

approval, were promoted from civil service eligibility lists, although not necessarily from this list (emphasis supplied by petitioner). These issues, and others bearing on the rationality of the Department's determination, ought to be explored at an evidentiary hearing on remand.

This constitutes the decision and order of the Supreme Court, Appellate Division, First Department. Entered: December 12, 1991.

EXHIBIT "C"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for petitioner Terry Hasenstab.

Jeanette Ruiz was on brief for the City of New York Police Department.

DECIDED

April 1, 1991.

Petitioner initiated the instant proceeding by service of a Notice of Motion on February 11, 1991 for leave to reargue this Court's denial of petitioner's motion for contempt dated January 22, 1991. The respondents on March 7, 1991 interposed an Affirmation in Opposition to said motion.

Now, upon reading and filing the Notice of Motion for leave to reargue dated February 11, 1991, the Affirmation in Support of the Motion of David Jalosky, ver-

ified the 11th of February, 1991,with the exhibit annexed thereto and having read the Affirmation in Opposition to the Motion for leave to Reargue, affirmed the 7th day of March 1991, and the exhibits annexed thereto; it is ORDERED and ADJUDGED, that petitioner's motion is denied for the reasons set forth in this Court's order dated January 22, 1991. Furthermore, petitioner is precluded from bringing any further motions based on the claims set forth in this motion without prior approval from this court and notice to respondents.

EXHIBIT "D"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for the petitioner, Terry Hasenstab.

Jeanette Ruiz was on brief for the City of New York Police Department.

DECIDED

January 22, 1991

FILED

March 10, 1991

Petitioner moves to reargue the decision and order of this court dated August 23, 1990. For the reasons set forth herein petitioner's motion is denied.

Petitioner claims that this court in its decision on the contempt motion either over looked or misapprehended rel-

avent facts, or misapplied controlling principles of law. Essentially, petitioner's contention is that the court's decision remanding the matter to respondent for reconsideration became final when respondent failed to appeal, and that they cannot now benefit from subsequent case law precluding petitioner's retroactive promotion.

Petitioner's argument must fail for the simple fact that there is no basis for his assertion that this court's order remanding the matter for further reconsideration constituted a final order. Indeed, case law supports the proposition that the order cannot be characterized as a final one. Courts which have addressed this issue have consistently held that a remand order is not final when the agency to which the matter is remanded may, pursuant to the court's decision, exercise discret-

ion in its determination. New York State Division of Housing and Community Renewal et. al., 156 AD2d 896 (3rd Dept. 1989), Leung v. Department of Motor Vehicles, 65 AD2d 736 (1st Dept. 1978), Coor Development Corp. v. Weber, 41 AD2d 689 (4th Dept. 1973), Schreck v. Wyman, 39 AD2d 809 (3rd Dept. 1972) see also, Spears v. Berle, 48 NY2d 254, 264 (1979), School Dist. v. Nyquist, 38 NY2d 137, 141 (1975). It is only when the decision of the court directs the agency to perform a ministerial duty or make a determination consistent with the findings of the court that the order is construed as a final order. Palaez v. Waterfront Commission of New York Harbor, 48 NY2d 1021 (1980), Mid-Island Hospital v. Wyman, 15 NY2d 374 (1965).

Here the remand order was not final; the court made no specific findings or determination, but simply remanded the matter for further consideration. The agency was

free to take whatever action in its discretion, it deemed appropriate.

Inasmuch, the court's decision was not a final order, it was not appealable as of right, Desmone v. Blum, 99 AD2d 170 (2nd Dept. 1984), Tennants' Committee v. Jov, 58 AD2d 797 (1st Dept. 1977) and consequently petitioner's reliance on the doctrine of res judicata is misplaced.

Finally, I do not believe that petitioner has stated any cognizable constitutional claim based on the equal protection clause. (Emphasis supplied by petitioner).

Accordingly, petitioner's motion for leave to reargue is denied in its entirety.

EXHIBIT "E"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for petitioner, Terry Hasenstab.

Jeanette Ruiz was on brief for the city of New York Police Department.

DECIDED

August 23, 1990.

Petitioner's contempt motion is decided as follows:

By decision dated October 27 1987, this Court granted petitioner's motion for reargument to the extent of **ordering** the NYPD to **reconsider** its determination denying petitioner retroactive retirement to the rank of sergeant and recalculation of his retirement benefits (**emphasis supplied** by petitioner) Additionally, the Court ordered respondents to provide petitioner with

the medical, promotion and retirement records of the three officers cited by him.

On or about February 11, 1988, respondents moved before this Court for permission to appeal. Respondents were served with this Court's order denying their motion for permission to appeal on March 17, 1989. Pursuant to section 5519 (a) (1) of the CPLR, this Court's remand order was automatically stayed pending a ruling on respondents' motion for leave to appeal.

Approximately one and one half months after respondents were served with this Court's order, denying their motion for leave to appeal, the Court of Appeals decided the case of Deas v Levitt, 73 NY2d 525 (1989).

This Court now finds the Deas case to be controlling precedent in the instant case. In that case, the Court of Appeals clearly held tha before being entitled to placement on a special eligible list, for a civil service position, an applicant must bring a proceeding before the lis

expires, successfully challenging the validity of the list. The Court emphasized that the nature of the claim had to be a challenge to the validity of the list itself, asserting that the constitutional merit and fitness requirements had been violated.

In the instant case, the list on which petitioner's name appeared, and pursuant to which he alleged he was improperly passed over for promotion subsequent to his retirement, due to medical disability, was a rerated list. This list had been corrected, pursuant to a regrading of several answers on the civil service examination in question.

Therefore, it is clear that the petitioner, herein, is not attacking the list as being in derogation of constitutional merit and fitness requirements. Rather, the nature of his claim is that he was wrongly ruled ineligible. The Court of Appeals has now clearly held that there is no constitutional prohibition against distinguishing between these classes of applicants.

(Matter of Deas v. Levitt, supra, at 534).

Confronted with the precedent of Deas, which this Court views as controlling, the instant motion for contempt, as well as the instant Article 78 petition must be dismissed.

This constitutes the decision and order of the Court.

August 23, 1990
Bronx, New York

Justice Joseph A. Mazur
Presently sitting in
Bronx County

EXHIBIT "F"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for the petitioner, Terry Hasenstab.

Suzanne L. Bailey was on brief for the City of New York Police Department.

DECIDED

October 28, 1987

Petitioner, a retired member of the New York Police Department has brought this motion for renewal from an order and judgment of this Court dated April 8, 1985 and filed April 11, 1985, which denied petitioner's first motion to renew this Article 78 proceeding. Petitioner further moves for an order directing the production of certain police department records.

Since the facts in this case have been

previously stated, a brief recitation here will suffice.

On November 24, 1978, petitioner took Examination #8539 for promotion to sergeant. On July 9, 1980, he was informed by the New York City Department of Personnel that he had failed the examination.

Petitioner suffered line-of-duty injuries on July 16, 1981 and May 5, 1982. He remained on sick leave from May 5, 1982 until his retirement from the Police Department in August of 1983.

On August 23, 1982, petitioner filed an application for accident disability retirement. Approval of petitioner's application was recommended by the Police Pension Fund Medical Board on June 7, 1983. The recommendation was subsequently approved by the Board of Trustees of the Police Pension Fund and petitioner's application for accident disability retirement was granted effective August 31, 1983. Approximately one month

after the Medical Board issued its recommendation concerning petitioner's disability, on July 6, 1983, respondents were directed to re-rate Examination #8539 to give credit for certain answers for which credit had originally been denied.

On or about July 20, 1983, the examination was re-rated and a new list of those passing, which included petitioner's name, was drafted. Those candidates who passed Examination #8539, according to the re-rating and whom respondent alleges were otherwise eligible for promotion were directed to report to the Police Academy on August 22, 1983 for a Basic Management Orientation Course.

Petitioner was not included in the group of individuals directed to report to the Police Academy. Respondent has maintained that petitioner's exclusion was based solely upon his previous application for accident disability retirement and the

finding by the Medical Board that he was, in fact, incapable of performing full police duties.

The instant Article 78 proceeding was commenced by the petitioner in January of 1984. In reply to respondents' answer, which denied that petitioner was entitled to a promotion to sergeant, due to his physical incapacity, the petitioner asserted that respondents' administrative practice has been to promote all eligible candidates. Petitioner further alleged that an unidentified candidate for promotion to sergeant had been permitted to attend the orientation course for new sergeants despite the fact that he was on sick leave at the time the promotion list was promulgated.

In the face of a complete lack of evidence that other candidates situated similarly to the petitioner had been treated in a different manner, this Court accept-

ed the following arguments set forth by respondents: 1) Individuals appearing on eligibility lists cannot assume that they will automatically be promoted, and; 2) the Police Commissioner may exercise discretion to bar the promotion of any officer who is physically unable to perform full police duties. Emphasis was also placed in the Court's decision upon the lack of documentation which might have substantiated petitioner's claim of discriminatory treatment.

A motion to reargue was brought by the petitioner on November 21, 1984. In an apparent attempt to supply the kind of facts which the Court found lacking in the original motion, petitioner's attorney made the following allegations concerning the promotions of other individuals:

1) Sergeant Terrence McTigue was promoted to lieutenant on November 23, 1977 while on sick leave, and;

2) On January 26, 1983, Police Officer Rocco Pascarella, Detective Investigator Salvatore Pastorella and Detective Investigator Anthony Senft were promoted.

This attempt to document the treatment of other police department employees, with the objective of demonstrating that their promotions were awarded in circumstances comparable to those under which petitioner's promotion was denied, was once again found lacking by the Court, both on its face and in supporting facts. As pointed out by the respondents at that time, no details concerning the physical condition of candidates allegedly allowed to return from sick leave to receive their promotions were provided, nor was any documentation provided beyond the statements made by petitioner's attorney.

A second motion to renew brought by the petitioner is now before this Court. Both the

allegations made in this motion and the documents submitted to support them differ substantially and significantly from those previously presented by the petitioner.

One of the principal reasons for denial of petitioner's first motion to reargue in this case was that counsel's affirmation, in support of that motion was clearly deficient in several respects. The statements made were totally unsupported by medical records or affidavits by individuals with first-hand knowledge of the matters alleged. No details were given concerning the physical condition of the individuals mentioned. Furthermore, regarding three of the four individuals mentioned in this affirmation, it was not alleged that their promotions were received while on sick report. This Court also noted that the individuals cited by petitioner's attorney did not take the examination taken by petitioner for promotion to sergeant, but rather were promoted

to other police department positions.

In the motion now before the Court, the deficiencies outlined have been substantially corrected. For the first time, this Court has before it **medical reports which demonstrate that two police officers received promotions while on sick report** (**emphasis supplied** by petitioner). More importantly, the reports **document that the officers were injured to an extent which precluded them from performing full police duties** (**emphasis supplied** by petitioner). Sgt. Terrence McTigue was injured on September 11, 1976 and was placed on sick list September 11, 1976 until the date of his retirement in 1986. The documents further indicate that Sgt. McTigue was promoted to the rank of lieutenant, effective November 23, 197 while on sick leave. (Police Department Personnel Order No. 385--petitioner's Exhibit "A").

Most importantly, the medical reports in

petitioner's Exhibit "B" demonstrate that although McTigue was not examined by the Medical Board **prior to his promotion, he was [severely] disabled and physically "unable" to perform full police duties** (**emphasis supplied** by petitioner). The Medical Board Police Pension report indicated that the lieutenant **had been on sick report since the time of his line-of-duty injury and [concluded] that the conditions manifested were "disabling" and permanent** (**emphasis supplied** by petitioner).

In this motion to reargue, petitioner has also submitted documentation concerning one Police Detective, Michael Duffy which **"clearly" indicates another instance of promotion of a [disabled] individual on "sick" report** (**emphasis supplied** by petitioner). The Police Pension Board material pertaining to Detective Duffy indicates that he was injured on April 17, 1984

while serving in the Police Department in the rank of police officer. Duffy [remained] on "sick" report from April 17, 1984 until the time of his retirement on accident disability (emphasis supplied by petitioner).

Although the medical evidence submitted as Exhibit "C" of petitioner's affirmation indicates injuries of less severity than those of Lt. McTigue's, the Police Department Medical Board evaluated Duffy's status in November of 1985 as follows: "In view of the multiple injuries...a permanent partial disability that precludes full police duty." Despite this disability, Duffy was [promoted] to the rank of detective on March 29, 1985 (emphasis supplied by petitioner).

Petitioner has furthermore documented the promotions of officers Pascarella, Pastorella and Senft on January 26, 1983, alleging that these individuals were also

on sick report on that date. While the Court does not have the medical records of Pascarella, Pastorella and Senft before it and is, therefore, unable to make any evaluation of the extent of their disabilities, relative to those of the petitioner, **it is undisputed that they were promoted while on sick report and have [remained] as members of the Police Department several years "after" their injuries (emphasis supplied** by petitioner).

As part of the instant motion, petitioner is seeking an order directing respondents to produce medical, promotion and retirement records of these three officers, claiming that those records would reveal the types of injuries suffered and the extent of resulting disabilities. These three individuals are still members of the NYPD.

Respondents' original argument

cited petitioner's physical disability as barring him from promotion under Section 50 of the New York Civil Service Law and Rule 4.3.2 of the City Personnel Director. They further stated that it was "unthinkable" that petitioner, who had applied for an accident disability retirement and had been found by the New York Police Department Medical Board to be permanently disabled, would be promoted to sergeant. The logic apparent in respondents' argument is now [refuted] by documentation of their own actions in promoting other individuals whose injuries were at least as serious and disabling as that suffered by the petitioner. In fact, in the case of Lt. McTigue, the injuries involved were clearly more extensive and severe than those of the petitioner. There are no facts presently before this Court which would explain this apparent difference in treatment of the petitioner (emphasis sup-

plied by petitioner).

Being confronted for the first time with evidence which demonstrates a difference in the treatment accorded petitioner to that of other Police Department employees, this Court is now compelled to reconsider petitioner's claim of arbitrary, capricious and unlawful action on the part of the Police Department in his case (emphasis supplied by petitioner).

Additionally, the Court notes petitioner's allegations that he was never notified, pursuant to Civil Service Law Section 50, subdivision 4, that he had passed Examination #8539 and that he was not being promoted for reasons of physical disability (emphasis supplied by petitioner). Unaware of his eligibility for promotion, pursuant to the re-rating of Examination #8539, petitioner reported to the Police Department Pension Section on September 1,

1983 and, pursuant to the advice of processing personnel, he waived over one hundred days of accrued leave and retired, effective August 31, 1983, approximately two weeks prior to the promotion of other candidates to sergeant, pursuant to the re-rated examination. Petitioner also asserts that he did not voluntarily file an application for accident disability retirement, but rather was [ordered] to do so by his district police surgeon (emphasis supplied by petitioner). He alleges that this is another indication of discriminatory treatment in his case, since the other injured individuals discussed in the instant motion were [clearly] allowed to remain as Police Department members for "extended" periods of time, following their injuries (emphasis supplied by petitioner).

In summary, this Court has now been presented with evidence of disparities in

the treatment of promotions of other seriously injured Police Department employees and that accorded to the petitioner. Petitioner has **fully documented** two cases where Police Department personnel with injuries **at least, if not more, disabling than his own, were promoted while on "sick" report** (**emphasis supplied** by petitioner). He furthermore alleges that the medical records in an additional three cases would reveal similar situations if disclosed.

At this time, the Court does not have enough information before it to determine whether the cases cited by petitioner are unusual exceptions which may have valid explanations to distinguish themselves from his case, or whether they represent a regular practice. There may be other factors involved in these cases of which this Court is unaware. As previously noted, the ranks to which the other individuals cited were promoted were not the same as that which

the petitioner was seeking. While this Court now feels that **in the face of the new evidence which has been presented, this distinction, without more, cannot stand as a reason for rejection of the petitioner's claim (emphasis supplied** by petitioner). There may be an explanation for the apparent difference in treatment which has to do with varying demands placed upon Police Department personnel of different rank, respondent has not addressed this point.

The Court recognizes that the facts of the sick records and promotions of the individuals cited in petitioner's instant motion for renewal were in existence at the time his original petition and first motion for reargument were submitted. The Court also finds, however, that these facts were not previously brought to the attention of the Court for excusable reasons. At the time of the original

petition, petitioner was unaware of the facts and circumstances concerning McTigue, Pastorella, Pascarella and Senft and, at the time of his first motion for reargument, he was unaware of the facts and circumstances concerning Duffy. Furthermore, the records which have now been submitted to the Court were **under Police Department control** and not subject to the Freedom of Information Law (**emphasis supplied** by petitioner). Upon the retirement of McTigue and Duffy, petitioner was able to obtain a copy of their medical records for the first time. Since the other three individuals in question have not yet retired, their medical records are still unavailable to the petitioner.

Therefore, the decision of this Court is as follows: This case is hereby remanded to the Police Department for further proceedings in accordance with this decision, taking into account the new documentary

evidence submitted by the petitioner. In addition, pursuant to Section 2307 (a) of the CPLR, respondents are directed to provide the medical, promotion and retirement records of Detective Investigators Pascarella, Pastorella and Senft so that these records may be taken into consideration by the Police Department in their reconsideration of petitioner's claim.

EXHIBIT "G"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 86 Civ. 6560 (SWK)

Before
Hon. Shirley Wohl Kram, United States District Judge.

Alan Levine was on brief for the petitioner, Terry Hasenstab

Suzanne Bailey was on brief for the City of New York Police Department.

DECIDED

June 26, 1987

Terry Hasenstab, a retired police officer with the New York City Police Department ("NYPD"), commenced this action pursuant to 42 U.S.C. Section 1983. Hasenstab alleges that the NYPD violated his fourteenth amendment due process rights by failing to notify him that he passed a promotional examination for the position of sergeant, failing to promote him to that position, and **selectively** pro-

moting persons who were on sick leave. Hasenstab seeks a judgment from this Court ordering the NYPD to reconsider his promotion in accordance with due process of law and for an award of damages, and reasonable attorneys' fees.

This action is currently before the Court on a motion by the defendants **Joseph Preiss, Robert J. McGuire, Benjamin Ward, Edward I. Koch, Joan Preston, Leonard Kaplan and John Bnettner** (Collectively the "City defendants"), to dismiss the complaint pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that Hasenstab's claims are barred by res judicata.

BACKGROUND

The following facts are undisputed. In 1978, Hasenstab, while a police officer with the NYPD, took an examination for promotion to the position of sergeant. He was informed that he failed on July 19, 1980.

After the NYPD promulgated an eligible list from the examination for promotion to sergeant, a state court proceeding was commenced challenging the propriety of that eligible list. See Matter of Esposito v. Nadel, No. 21835/80, (N.Y. Sup. Ct., July 6, 1983).

During this time, in May, 1982, while apprehending a suspect in the line-of-duty, Hasenstab suffered serious injuries to his knee and back. He left work on sick leave and remained on that status while the NYPD reviewed his application for retirement on accidental disability benefits.

In July, 1983, pursuant to Matter of Esposito, a state court judgment was entered ordering that the results of the examination for promotion to sergeant be rescored. Later that month, a new eligible list of those who had passed that examination was promulgated. All those who passed and who

were so notified attended a basic management orientation course that began in August, 1983 and were promoted to the rank of sergeant in September, 1983.

Meanwhile, Hasenstab's application for accidental disability retirement benefits was approved by the Police Pension Fund in August, 1983. In early September, Hasenstab followed the NYPD's advice (Bnettner's) to forego 115 days of terminal leave time he was entitled to and accept a cash payment instead. As a result, Hasenstab's date of retirement from the NYPD was August 31, 1983. On September 15, 1983, the NYPD notified Hasenstab that he had passed the examination for promotion to sergeant.

In January, 1984, Hasenstab commenced a proceeding in New York State Court under Article 78 of the New York Civil Practice Law and Rules, Hasenstab v. McGuire, No. 24831/84 (N.Y. Sup. Ct., July 6, 1984).

Hasenstab challenged, as arbitrary and unlawful, the failure of the NYPD to notify him that he passed the examination making him eligible for promotion to sergeant and its retiring him on the disability pension of a police officer instead of a sergeant. The relief sought in that Article 78 proceeding was appointment to the rank of sergeant retroactively to August 30, 1983 and recomputation of retirement benefits to reflect the salary of a sergeant rather than that of a police officer. Hasenstab did not plead or raise any federal constitutional claims.

In June, 1984, the New York Supreme Court held that based on Section 61 of the New York Civil Service Law, one whose name appears on an eligible list cannot assume that he actually will be promoted. Further, the court held, under Sections 50 and 52, that an individual must be physically fit and capable of performing the duties

of a desired position in order to receive the desired promotion. The court held it is within the Police Commissioner's discretion to refuse to promote a police officer who is physically unable to perform full police duty. Failing to notify Hasenstab that he passed the rescored examination before his retirement, the court held, had the effect of refusing to promote him, Hasenstab, No. 24831/84 at 3.

Hasenstab argued that the NYPD had in practice promoted all eligible candidates and that another candidate on the list was permitted to return from sick leave, attend the management course in August, and receive a promotion. The court found that no affidavits in support of this were submitted by individuals with first-hand knowledge of these allegations and that a review of all the circumstances showed that, "(NYPD's) determination was not arbitrary and capricious and did not constitute an

abuse of discretion," Hasenstab, No. 24831/84 at 4. In a judgment filed on October 3, 1984, Hasenstab's petition was dismissed and the relief requested was denied.

Hasenstab moved to reargue in state court. The basis for this motion was that in 1977 a sergeant who was on sick leave from the NYPD was promoted to the rank of lieutenant purportedly to afford that sergeant a higher retirement pension. He also alleged that in 1983, three uniformed members of the Police Department were promoted to the rank of detective. In addition, Hasenstab asserted that on the advice of the NYPD's Pension Division, he waived leave time he was entitled to, and retired effective August 31, 1983, and that, had he not waived that time, he would have retired on January 15, 1984. Hasenstab did not raise or plead any federal constitutional claims in this motion.

In considering Hasenstab's motion to

reargue, the state court held that the information submitted did not provide persuasive new information or the type of affidavits the court requested in its initial decision. The individuals mentioned in petitioner's affirmation were not promoted pursuant to the examination at issue in the proceeding. Those individuals were promoted to lieutenant and detective positions, not to the position of sergeant and their promotions did not take place at a time relavent to the proceeding. Furthermore, the affidavits included no details about the physical condition of a candidate allegedly allowed to return from sick leave to receive his promotion to sergeant. There was no indication whether the physical ailment was similar to the one Hasenstab suffers. The court denied the motion to reargue, Hasenstab, No. 24831/84 (N.Y. Sup. Ct., April 10, 1985).

Thereafter, Hasenstab commenced the present action seeking a judgment ordering de-

fendants to reconsider his promotion in accordance with due process of law and for damages and reasonable attorneys' fees.

CITY DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF RES JUDICATA

Under the doctrine of res judicata, or claim preclusion, a "final judgment on the merits of an action precludes the same parties from relitigating issues that were or could have been raised in that action." Federated Department Stores v. Moitie, 452 U.S. 392, 398 (1981). The doctrine "is not a mere matter of practice or procedure... it is a rule of fundamental and substantive justice, of public policy and of private peace, which should be cordially regarded and enforced by the court" Id. at 462.

In Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984), the Supreme Court determined that 28 U.S.C. Section 1783, which implements the Full

Faith and Credit Clause of the United States Constitution, requires that federal courts afford prior state court proceedings the same preclusive effect in Section 1983 actions that the state court would afford those proceedings, regardless of whether the issues in the federal action had actually been litigated in the prior state action. As the Court wrote, "Section 1738 embodies the view that it is more important to give full faith and credit to state court judgments, than to ensure separate forums for federal and state claims. Migra, 465 U.S. at 76. The job of this court is to examine New York law to determine if Hasenstab's present claim is barred by res judicata. Migra, Id.

New York courts use a transactional approach to res judicata in determining whether a claim litigated on the merits is precluded by a previous judgment Smith v. Russell Sage College, 54 N.Y.2d 185 (1981).

A cause of action arises from the same transaction and is barred by the prior judgment, "where the same foundation facts serve as a predicate for each proceeding" Matter of Reilly v. Reid, 407 N.Y.S.2d 645 (1978). This includes all claims that were litigated or could have been litigated at that time. O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981).

Applying these principles and recent case law to the present action, Hasenstab's claim against the NYPD is barred by res judicata. First, under New York's transactional approach, Hasenstab is suing the same parties for a claim based on the same foundation of facts arising from the same transaction. In fact, he is suing the defendants for exactly the same violations and is simply labelling his cause of action differently.

Second, Hasenstab fully litigated his case in state court. There was a full proceeding in state court, Hasenstab v. McGuire, No. 24831/84

(N.Y. Sup. Ct., July 5, 1984), and a written decision denying Hasenstab's motion to relitigate, Hasenstab v. McGuire, No. 24831/84 (N.Y. Sup. Ct., April 10, 1985). The court denied his motion to reargue after considering the merits of the claim. This is not a case, therefore, in which no prior judicial proceeding was held. McDonald v. City of West Branch, 466 U.S. 284 (1984) (Section 1738 does not require that federal courts give preclusive effect to arbitration proceedings since they are not judicial). New York courts would consider this a fully litigated case on the merits and precluded from further litigation by res judicata.

Finally, Hasenstab could have raised his constitutional claim in the Article 78 proceedings. Under New York law, this omission precludes Hasenstab from later raising the same issues in federal court. Gargiul v. Tompkins, 790 F.2d 265 (1986). A constitutional claim in a 1983 action must be

raised during Article 78 proceedings. "The reality [is that] the critical facts underlying plaintiff's claim were as available for presentation in court at the time of the [first action] as at any time thereafter," Gargiul, Id. at 270. This Court finds no reason in the record to explain why Hasenstab failed to raise his constitutional claims during his Article 78 proceedings.

Hasenstab argues that his Article 78 proceeding to gain a retroactive promotion and concomitant increase in his pension is a different cause of action from his present Section 1983 claim on due process grounds, **alleging he was the victim of a NYPD policy and practice to "selectively" promote persons who are on sick leave** (emphasis supplied by petitioner).

This argument is without merit under New York law. Hasenstab fails to show the development of new facts bearing on the validity

of his due process claim, or that any new injury occurred from a separate transaction. Hasenstab has merely edited his complaint from the state court proceedings, claiming a due process action for damages to enable him to have another day in court.

Hasenstab also relies on Davidson v. Capuano, F.2d 275, 278 (2d Cir. 1986), to argue that his claim is not barred because he could not have obtained full relief in state court. In Davidson, the court addressed the issue whether, under New York law, a judgment in an Article 78 proceeding precludes a later civil rights claim for damages based on the same underlying facts. The court focused on the question of whether the state court in Article 78 proceedings was empowered to award a plaintiff the full measure of damages he sought in the federal action. The Second Circuit, after an analysis of New York law, and in light of Migra, found that federal courts

should hear later civil rights actions seeking only monetary damages, since Article 78 proceedings generally do not consider collateral issues such as damages. The court, however, did not hold that a state court considering an Article 78 proceeding did not possess the power to adjudicate federal Constitutional questions. New York law is well settled that a New York state court has such power. See Gargiul, 790 F.2d 265; Unger v. Blum, 470 N.Y.S.2d 440, 441 (2d Dept. 1984); Anderson v. County of Suffolk, 407 N.Y.S.2d 661 (2d Dept. 1983).

In this case, the barriers to relief that concerned the Davidson court are not present. Hasenstab was not prevented from raising his federal constitutional claim in the Article 78 proceedings. The only barrier to Hasenstab's constitutional claim was that he could not have recovered damages In contrast, the plaintiff in Davidson, raised his constitutional claim during an Article 78

proceeding, prevailed on the merits, and then proceeded to federal court for a damage claim, which was not obtainable in state court.

If this Court interpreted Davidson, as Hasenstab suggests, any plaintiff could withhold a constitutional claim for federal court to ensure a second opportunity to litigate in the event he loses in state court. The Supreme Court ruled on this in Migra, when it stated, "Section 1983, however, does not overrule state preclusion law and guarantee [plaintiff] a right to proceed to judgment in state court on [his] state claims and then turn to federal court for adjudication of [his] federal claim," Migra, 465 U.S. at 85. The Second Circuit in interpreting New York law, also would disallow such a practice, Gargiul, 790 F.2d at 265. To date, Davidson has only been applied where plaintiffs have won Article 78 pro-

ceedings and then moved in federal court on damage claims to get the relief sought in, but not offered by, the state court. Giano v. Flood, 803 F.2d 769 (2d Cir. 1986); Catten v. Coughlin, 644 F. Supp. 1228 (1986).

Finally Hasenstab argues that under Lawrence v. McGuire, 651 F. Supp. 312 (S.D.N.Y. 1987), his claim is not precluded by the prior state court judgment Lawrence, however, is readily distinguishable from this case. In Lawrence, the plaintiff prevailed under the doctrine of collateral estoppel or issue preclusion, and not res judicata. The court found that the constitutional issue he raised in the Article 78 proceeding had been raised but not fully litigated in the state forum. In this case, the issue before us is res judicata, not collateral estoppel, and since the Constitutional question was not raised in the first forum, neither issue or claim preclusion allow further litigation of this suit.

CONCLUSION

The Court finds that all of Hasenstab's claims fall squarely within the Migra and Gargiul rule and that since New York law controlled in Hasenstab's prior proceeding, New York courts would afford preclusive effect in the context of his present claims.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
June 26, 1987

EXHIBIT "H"

STATE OF NEW YORK
COURT OF APPEALS

Mo. No. 959

Before
Hon. Sol Wachtler, Chief Judge, presiding.

Terry Hasenstab, petitioner, pro se petitioned the Court to reconsider its decision.

Deborah R. Douglas responded in opposition for the City of New York Police Department.

DECIDED

September 22, 1992

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

DONALD M. SHERAW
Clerk of the Court

EXHIBIT "I"

SUPREME COURT OF THE UNITED STATES

No. A-383

Before

Hon. Clarence Thomas, **Associate Justice of the Supreme Court of the United States**

Terry Hasenstab,
Petitioner

V.

Robert J. McGuire, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 19, 1993.

/s/ Clarence Thomas
Associate Justice of the Supreme Court of the United States

Dated this 12th day of November, 1992

EXHIBIT "J"

NOTICE OF RECONSIDERATION

FROM

CITY OF NEW YORK
POLICE DEPARTMENT

DATED

November 29, 1989

Goldberg & Jalosky
11 Park Place
New York, New York 10007

RE: TERRY HASENSTAB

Dear Sir:

I am writing in regard to your client Terry Hasenstab's request for a retroactive promotion to sergeant from list number 8539. In accordance with Judge Joseph A. Mazur's decision dated October 28, 1987, the Police Department has reconsidered the decision not to promote Mr. Hasenstab.

The list from which Mr. Hasenstab seeks promotion, expired on September 19, 1984. In a recent decision, Deas v. Levitt, the New York Court of Appeals held that a petitioner who alleges only that he was wrong-

fully denied certification on a eligible list, is not entitled to be promoted once that list has constitutionally expired. In accordance with that decision Mr. Hasenstab's request is denied.

Very truly yours,

THOMAS E. SLADE
Assistant Deputy Commissioner
Legal Matters

TES/DTM:DW
CL15856L

EXHIBIT "K"

NOTICE FROM THE NEW YORK CITY CIVIL SERVICE COMMISSION TO 132 POLICE OFFICER CANDIDATES WHO APPEALED THEIR DISQUALIFICATIONS FROM LIST #7009, THERETO.

DATED

May 1, 1992

Each Police Officer candidate listed on the attached schedule appealed from determinations by the City Personnel Director and New York City Police Department disqualifying each such candidate who took Exam. No. 7009. The administrative appeals from 85 such candidates were pending before this Commission prior to January 27, 1992, when the eligible list for Exam. No. 7009 terminated by order of the City Personnel Director. Forty-seven such appeals were filed after January 27th by candidates disqualified immediately preceeding the list's expiration. We consolidated all 132 appeals for disposition.

Section 812 of the New York City Charter entitles each appellant to appeal from the de-

termination below. However, pursuant to Deas v. Levitt, 73 N.Y.2d 525, cert. denied, 110 S. Ct. 324 (1989), any rights that an applicant has to consideration for appointment end with the list's expiration. The only explicit exception made by the Court of Appeals in Deas is when an applicant commences a judicial proceeding that challenges the validity of the entire eligible list before its expiration. Such exception does not appear to apply in any of the appeals now under consideration.

It should be noted, however, that **all of the appeals appear to raise issues that might distinguish them from Deas (emphasis supplied** by petitioner). In Deas, the pertinent eligible list was established in March 1984. Deas was disqualified in March 1985. This Commission received the record from the Department of Personnel in sufficient time to conduct an evidentiary

hearing and render its determination by August 14, 1986. The eligible list expired by order of the Personnel Director on August 27, 1986. Thus Deas' administrative appeal was adjudicated on the merits thirteen days before the pertinent eligible list expired. 73 N.Y.2d 528. However, the Department of Personnel did not have sufficient time to implement the change ordered by the Commission, before the eligible list expired.

Unlike Deas, full adjudication on the merits of the administrative appeals now before us was not possible before January 27, 1992. An analysis of these present appeals presents several facts relavent to issues not addressed by the Court of Appeals in Deas.

Most significantly, these appeals include approximately 75 from candidates who were disqualified between December 5,

1991 and January 24, 1992 (emphasis supplied by petitioner). The notices advised the candidates of their right under Section 812 to appeal to this Commission within 30 days of the date of the determination. Consequently, 51 appeals were timely filed within the 30 day requirement on or after the list's expiration.

Of these 75 appeals, approximately 55 were from candidates disqualified for purported lack of requisite good character. This figure contrasts sharply with the number of so-called "character" appeals that were adjudicated on the merits throughout the duration of the eligible list (emphasis supplied by petitioner). In accordance with the provisions of Civil Service Law Section 56, the list for Exam. 7009 existed for four years from January, 1988 through January 27, 1992. During the four year period of time, this Commission only de-

cided 16 character appeals from all of the existing Police Officer lists as compared to the present 55 character appeals.

Of the remaining 20 disqualifications during December 1991 and continuing through January 24, 1992, only three were for failure to meet the pertinent medical standards; the balance were for purported lack of psychological suitability.

Also of the 132 appeals, there are 40 for which the City **submitted the complete record in either December 1991 or January 1992** (**emphasis supplied** by petitioner). Twelve of the records submitted in January articulate the City's basis for disqualifying the candidates for purported poor character. Under Commission Rule 2.4, if **if the eligible list had not expired**, the Commission would have ordered an evidentiary hearing, since none had taken place earlier (**emphasis supplied** by petitioner).

Six appeals are from appellants who ap-

pealed from their medical disqualifications in 1988 and submitted medical evidence then or shortly thereafter; however, the Department of Personnel "never" submitted any position statement or notified any appellant that he could move to have the matter considered by the Commission (emphasis supplied by petitioner). Therefore, when the eligible list expired, this Commission had no documents before it except for a notice of appeal and appellant's supporting evidence.

From these facts it appears that appellants could arguably raise a number of claims for relief, notwithstanding expiration of the eligible list, including:

1) A claim that the City's delay in processing appeals to the Commission and/or in disqualifying appellants was in bad faith, Deas, supra, 73 N.Y.2d at 533,fn.1;

2) A claim that the City's determination "violates" a liberty or property interest of

appellant or that appellant is entitled to a name-clearing hearing, See Matter of City of New York v. City Civil Service Commission (Gariti), 141 Misc.2d 276 (Sup. Ct. N.Y. Co. IAS Part 20 1988); and/or

3) A claim that the City failed to properly carry out its authority to determine the eligibility of a candidate, see Levoci v. Brown, NYLJ Sept. 20, 1991 at 22, col.3 (Sup. Ct. N.Y. Co. IAS Part 25). (Emphasis supplied in items one through three, supra, by petitioner)..

The sole relief sought by appellants before us is restoration to the now defunct eligible list for Exam. No. 7009. Deas makes it manifestly clear that we lack the authority to revive an expired list. The Court of Appeals found that the Merit and Fitness requirements of the New York State Constitution, Art. V, Sec. 6, are met only when civil service appointments are made from valid and existing eligible lists. 73 N.Y.2d at 529-31. The Court further found candidates such as Deas,

who successfully pass a civil service examination possess no property interest in appointment. Assuming arguendo that such an interest exists, that interest would only endure for the duration of the eligible list. Id at 532-33.

It is our inability to resurrect an eligible list, coupled with the absence of a property interest, that ultimately persuades us that any claim for relief must be pursued in a court of competent jurisdiction. In addition, we were influenced by the fact that no appellant here has been appointed to the subject position.

Therefore, adjudicating these appeals would be of no practical utility, and a waste of scarce resources for all parties. Under the circumstances, the determinations of the City Personnel Director and the Police Department cannot be permitted to stand, because no review of any of the determinations was possible prior to the ex-

piration of the eligible list. Accordingly, each of the determinations below is hereby vacated ab initio (emphasis supplied by petitioner).

No appellant shall be required to list this disqualification on any current or future application for City employment. The City, however, shall be permitted to examine and/or investigate each appellant and to disqualify him on similar grounds so long as such disqualification is consistent with the pertinent standards for the position sought.

In conclusion, the determination below is vacated for the reasons stated above with leave to any appellant to apply to any court of competent jurisdiction for further relief within the four month period established for Article 78 proceedings, and all applications by every appellant for appointment to the subject positions are denied.

MARK L.LEBOW HARRY (SIGNATURE NOT DIS-

CERNIBLE) STANLEY K. (SIGNATURE NOT

DISCERNIBLE)

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